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No. 98-9828

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IN THE SUPREME COURT OF THE UNITED STATES

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived the right to challenge on appeal the district court's in limine ruling that her prior conviction could be admitted as impeachment evidence if she testified at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 169 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960, and one count of possessing marijuana with intent to

distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 30 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed. Gov't C.A. Br. 2; Pet. App. 5, 10.

1. On July 29, 1997, petitioner attempted to enter the United States from Mexico through the port of entry at San Ysidro, California. Petitioner was the driver and sole occupant of a 1984 GMC van, which was later found to be registered in her name. A customs inspector noticed that someone had tampered with one of the van's interior panels. A subsequent search of the van uncovered more than 80 pounds of marijuana. Petitioner was arrested and subsequently indicted for importation of marijuana and possession of marijuana with intent to distribute it. Gov't C.A. Br. 3-4; Pet. App. 3-4.

The government filed motions in limine asking the district court to admit petitioner's 1993 felony conviction for possession of methamphetamine under Federal Rules of Evidence 404(b) and Federal Rule of Evidence 609(a)(1).[1] At a pretrial hearing, the court denied the motion to admit the conviction as substantive evidence under Rule 404(b) and reserved ruling on the motion to admit the conviction as impeachment evidence under Rule 609(a)(1). In ruling on another motion in limine, the court assured counsel

[1] Rule 609(a)(1) provides, in relevant part, that "evidence that an accused has been convicted of [] a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Fed. R. Evid. 609(a)(1).

that [y]ou can always revisit the issue at trial." The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." Pet. App. 4; 1/26/98 Tr. 35.

On the morning that trial was to begin, before the jury was selected, the court ruled in limine that, if petitioner testified, the government could use her prior conviction to impeach her. The court concluded that the probative value of the conviction outweighed any prejudice to petitioner from its admission. Gov't C.A. Br. 4-5; Pet. App. 4.

Late that afternoon, after the government had presented its case in chief and petitioner had presented her first witness, petitioner testified in her own defense. She raised no objection, either before or during her testimony, to the admission of her prior conviction. On direct examination, petitioner denied any knowledge of the marijuana discovered in the van. She claimed that the van had been taken to Mexico without her permission and that she had gone to Mexico simply to retrieve the van. She further testified that she had been convicted of possession of methamphetamine in 1993. Gov't C.A. Br. 6; Pet. App. 4.

On cross-examination, the government asked petitioner whether her prior conviction was for a felony, and petitioner responded that it was. On redirect examination, petitioner explained that the conviction was for possession of "a personal use quantity" of methamphetamine rather than "a distribution quantity." Pet. App. 4.

2. The court of appeals affirmed. Petitioner argued on

appeal that the district court abused its discretion in granting the government's in limine motion to admit evidence of her prior felony conviction under Rule 609(a)(1). The court of appeals declined to reach that argument. The court, relying on circuit precedent, held that "when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1)." Pet. App. 5.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that, by testifying about her prior felony conviction on direct examination, she waived her right to challenge the district court's in limine ruling that the government could impeach her with the conviction. The court of appeals' decision is consistent with the reasoning of Luce v. United States, 469 U.S. 38 (1984), and with the holdings of three other circuits. While there is some tension in the courts of appeals on this general issue, the decision does not present a direct circuit conflict that warrants the Court's review in the context of this case.

1. The court of appeals' decision is correct. In Luce, the district court ruled in limine that, if the defendant testified at trial, the government could use his prior conviction to impeach him under Federal Rule of Evidence 609(a)(1). The defendant did not testify. He then sought to challenge the district court's in limine ruling on appeal. The court of appeals refused to consider

the defendant's challenge and this Court affirmed, holding that, in order to preserve for review a challenge to an in limine ruling allowing the use of a prior conviction for impeachment purposes under Rule 609(a)(1), a defendant must testify at trial. 469 U.S. at 43.

The Court's holding in Luce rested largely on its conclusion that in limine rulings on whether a prior conviction may be admitted for impeachment purposes under Rule 609(a)(1) are not final rulings on admissibility. As the Court explained:

> Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.

469 U.S. at 41-42.

The Court also observed that a reviewing court in such circumstances "has no way of knowing whether the Government would have sought to impeach with the prior conviction." 469 U.S. at 42. "If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means," the Court explained, "the prosecutor might elect not to use an arguably inadmissible prior conviction." Ibid.

This Court's reasoning in Luce supports the court of appeals' holding in this case that, by testifying to her prior conviction on direct examination, petitioner waived her right to appeal the in limine ruling allowing the conviction as impeachment evidence. As the same court of appeals explained in an earlier decision on the

issue:

> Luce teaches that the admissibility of a prior conviction for impeachment depends to a great extent on the nature of the defendant's testimony. In practice, it is often difficult to determine in advance of this testimony whether the use of such a powerful form of impeachment is justified. * * * Even if the district court rules before trial that the prior conviction will be admissible if offered, based on the defendant's expected defense, it is always possible that the court will change its mind on hearing the defendant's actual testimony. The district court should retain discretion to reverse itself when this testimony brings into sharper focus the question of admissibility.

United States v. Williams, 939 F.2d 721, 725 (9th Cir. 1991). The court added that a rule that a defendant cannot testify on direct examination about a prior conviction and still challenge on appeal a pretrial ruling allowing the admission of the conviction is also consistent with "[a]nother lesson of Luce": that "the government should be free to decide against introducing a prior conviction when, for example, it appears later at trial that there is less need to impeach the defendant than previously thought, or that there are other less problematic means of impeachment available." Ibid.

Here, petitioner, in preemptively testifying about her prior conviction on direct examination, deprived the district court of the opportunity to perform the balancing of probative value and prejudicial effect that Rule 609(a)(1) requires in light of the testimony actually presented at trial. Petitioner also deprived the government of the opportunity to decide whether to use the conviction as impeachment. Petitioner thereby waived her right to challenge the in limine ruling on appeal. While such a holding results in a defendant's having to choose between preserving a Rule

609(a)(1) objection for appeal and attempting to soften the blow of damaging information by introducing it on direct examination, defendants have to make similar strategic decisions throughout the course of a trial. Cf. United States v. Mezzanatto, 514 U.S. 196, 209 (1995) (observing that the choice faced by the criminal defendant in that case -- whether to accept the government's condition for engaging in plea negotiations that he waive the exclusionary provisions of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) -- was "indistinguishable from any of a number of difficult choices that criminal defendants face every day"). A contrary conclusion "would in effect be licensing defendants to plant irremediable errors in their trials during direct examination," by testifying to convictions that the district court might have excluded based on the evidence at trial or that the government might have chosen not to use. Williams, 939 F.2d at 725.

2. Petitioner acknowledges (Pet. 5) that the First, Sixth, and Eighth Circuits, like the Ninth Circuit, have held that a litigant waives his right to appeal an adverse in limine ruling that a prior conviction may be admitted for impeachment purposes under Rule 609(a)(1) if the litigant testifies to the conviction on direct examination. See, e.g., Gill v. Thomas, 83 F.3d 537, 540-541 (1st Cir. 1996); United States v. Gaitan-Acevedo, 148 F.3d 577, 592 (6th Cir.), cert. denied, 119 S. Ct. 256 (1998); United States v. Smiley, 997 F.2d 475, 480 (8th Cir. 1993). Petitioner contends (Pet. 3-4), however, that the decision below conflicts with United

States v. Puco, 453 F.2d 539, 541 n.6 (2d Cir. 1971), and United States v. Fisher, 106 F.3d 622 (5th Cir. 1977), both of which allowed a defendant to challenge on appeal an in limine ruling that his prior conviction could be introduced for impeachment purposes, even though the defendant testified about the conviction on direct examination. While there is some disagreement in the courts of appeals on the general issue raised by petitioner, there is no square conflict that merits this Court's review.

The Second Circuit decided Puco 13 years before this Court decided Luce. The Second Circuit, citing Luce, has since recognized that "[a]n in limine evidentiary ruling does not constitute a final ruling on admissibility," Palmieri v. Defaria, 88 F.3d 136, 139 (1996), particularly with respect to rulings that "relevant evidence is unduly prejudicial," which "must be resolved in the developed context of trial," Rosenfeld v. Basquiat, 78 F.3d 84, 90 (1996). The continuing vitality of Puce in the Second Circuit is therefore uncertain.

The Fifth Circuit's decision in Fisher dealt with circumstances unlike those in the present case (or, for that matter, any other case applying a similar waiver rule). In Fisher, after the defendant's state court conviction was introduced at his federal trial, the Texas Supreme Court held that the conviction was constitutionally invalid. The Fifth Circuit's actual holding in Fisher was explicitly limited to those circumstances. See 106 F.3d at 629 ("Therefore, when the prosecution obtains, over objection, a ruling in limine that it may use evidence of an earlier

conviction if the defendant testifies, the defendant who introduces evidence of the conviction, later found to be constitutionally infirm, in direct examination in an effort to ameliorate the highly prejudicial effect of that evidence, should not be deemed to have waived objection to the erroneous introduction of such evidence.") (emphasis added).[2] In any event, in rejecting the waiver argument in Fisher, the Fifth Circuit simply adhered to pre-Luce circuit precedent, without addressing whether that precedent might be undermined by this Court's reasoning in Luce. See 106 F.3d at 629 (citing Reyes v. Missouri Pacific R.R. Co., 589 F.2d 791 (5th Cir. 1979)).[3] And at least one Fifth Circuit decision since Luce appears to have taken a contrary approach. See United States v. Galvan-Garcia, 872 F.2d 638, 640 (5th Cir. 1989) (where the defendant had filed a pretrial motion seeking to exclude evidence of a prior conviction but then "introduced, through his own testimony on direct examination, evidence of his prior conviction," the defendant "cannot now complain of the introduction of the prior conviction into evidence when he himself initially presented the

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[2] This Court intimated in Luce that, where a district court's in limine ruling involves a question of "constitutional dimensions," a different rule with respect to reviewability may be warranted. See 469 U.S. at 42-43.

[3] In addition to Fisher, the only Fifth Circuit decision cited by petitioner, at least two other post-Luce Fifth Circuit decisions have allowed a party to challenge an in limine ruling that a prior conviction may be used for impeachment, although the party volunteered the conviction in his opening statement or on direct examination. See Coursey v. Broadhurst, 888 F.2d 338, 341 n.3 (1989); Petty v. Ideco, 761 F.2d 1146, 1152 n.3 (1985). In both Coursey and Petty, as in Fisher, the court simply adhered to Reyes without acknowledging Luce.

evidence to the jury").

Petitioner also contends (Pet. 4) that two decisions of the Tenth and Eleventh Circuits, while not squarely on point, "seem to have sided" with Puco and Fisher. Petitioner is mistaken.

In United States v. Mejia-Alarcon, 995 F.2d 982, 987 (10th Cir.), cert. denied, 510 U.S. 927 (1993), the court of appeals held that an in limine ruling that a prior conviction qualified as a crime of dishonesty under Rule 609(a)(2) -- which the court characterized as "an evidentiary issue akin to a question of law" -- was sufficiently final that the defendant did not have to preserve an objection by renewing his challenge at trial. In so ruling, however, the court expressly distinguished in limine rulings, such as the one in this case, allowing a prior conviction as impeachment evidence under Rule 609(a)(1). The court explained that a determination as to the admissibility of a prior conviction under Rule 609(a)(1) cannot be made definitively before trial, because the determination "rests on a balancing of the probative value and prejudicial effect of the conviction -- a balancing that could only properly be performed after an assessment of the evidence that had come in up to the point of its admission." Id. at 987 n.2.[4]

[4] See also United States v. Martinez, 76 F.3d 1145, 1152 (10th Cir. 1996) (holding that the defendant waived his right to object to the admission of his prior convictions, where the district court declined to rule on the admissibility of the convictions under Rule 609(a)(1) until after the defendant testified, and the defendant acknowledged the convictions on direct examination to "draw the sting" in the event that the court allowed them as impeachment evidence)

The Eleventh Circuit has taken no position on the particular question presented in this case. In United States v. Pritchard, 973 F.2d 905, 908 (1992), the case relied on by petitioner, the court of appeals considered a defendant's challenge to an in limine ruling allowing a prior conviction to be used as impeachment evidence, where the defendant then testified to the conviction on direct examination. But there is no indication that the government argued to the court of appeals that the defendant had waived his challenge by so testifying or that the court considered the issue.[5]

Since the petition for certiorari was filed, the en banc Seventh Circuit decided Wilson v. Williams, No. 97-2637, 1999 WL 432591 (June 29, 1999). In Wilson, the court of appeals declined to adopt the rule that "a litigant who loses an evidentiary ruling and then offers the evidence himself has waived any opportunity to complain about the decision in limine," Id. at *4. The court

[5] In Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997), a tort action against a former sexual partner for wrongful transmission of genital herpes, the district court denied the plaintiff's motion in limine to exclude evidence of her sexual history. The plaintiff, after renewing her challenge at trial, then testified about her sexual history on direct examination. The court of appeals recognized that, "as a general proposition, an overruled motion in limine does not preserve a party's objection for purposes of appeal." Id. at 1342. The court, however, relied on the decision of "our predecessor circuit" in Reyes, 589 F.2d at 793 n.2, as recognizing an exception to that rule where "the movant, as a matter of trial strategy, presented the objectionable evidence himself on direct examination to minimize its prejudicial effect." 105 F.3d at 1342. Thus, the Eleventh Circuit in Judd, like the Fifth Circuit in Fisher, simply followed pre-Luce circuit precedent, without considering whether that precedent was undermined by Luce. The court's discussion of whether the plaintiff's objection was preserved was not essential to the outcome of the case, because the court ultimately held that the district court had not abused its discretion in admitting the evidence. 105 F.3d at 1343.

recognized that such a rule had been adopted by the First and Ninth Circuits. Ibid. (citing United States v. Williams and Gill v. Thomas).

The court of appeals then proceeded to discuss whether, or in what circumstances, a party may seek appellate review of an adverse ruling in limine if the party did not renew its objection at trial. The court distinguished between a "conditional, contingent, or tentative ruling" in limine, which requires a party to object at trial in order to preserve the issue for appeal, and "a definitive ruling in limine," which "preserves an issue for appellate review, without the need for later objection." 1999 WL 432591, at *1, *3.

Under the Seventh Circuit's analysis, the district court's in limine ruling allowing the admission of petitioner's prior conviction might be regarded as "conditional, contingent, or tentative." The district court's ruling was explicitly conditioned on petitioner's testifying at trial, stating that, "if the defendant takes the stand, she should be capable of being impeached" with her prior conviction. 1/28/98 Tr. 14; cf. Wilson, 1999 WL 432591, at *3 ("One good example of a conditional ruling is a judge's statement that, if a litigant testifies, then the adverse party will be entitled to cross-examine in such-and-such a way."). The district court's ruling was also necessarily tentative, given that in limine rulings allowing the admission of prior convictions under Rule 609(a)(1), which requires a weighing of probative value against prejudicial effect, are "subject to change when the case unfolds, particularly if the actual testimony differs from what was

contained in the defendant's proffer." Luce, 469 U.S. at 41. Indeed, in discussing another of its in limine rulings in this case, which similarly required a balancing of the probative value of proposed evidence against its prejudicial effect, the district court explained to counsel that "[y]ou can always revisit the issue" during trial. 1/26/98 Tr. 35. The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." Ibid. Accordingly, to the extent that the district court's in limine ruling was viewed as "conditional, contingent, or tentative," the Seventh Circuit, like the Ninth Circuit, would hold that petitioner had not preserved her challenge to that ruling for appeal.

3. There is an additional reason why this Court's review is not warranted in this case: Petitioner would not have been entitled to reversal of her conviction even if the Ninth Circuit had considered her claim on the merits. Indeed, given the standard under which courts of appeals review the admission of prior convictions under Rule 609(a)(1), the same could be said in most cases in which the waiver rule has been applied.

Rule 609 provides that evidence of a prior felony conviction that is less than ten years old, as is petitioner's prior felony conviction, is admissible to attack a witness's credibility if its probative value outweighs its prejudicial effect.[6] The Ninth

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[6] A felony conviction is not admissible if more than ten years have elapsed since the date of conviction or the date of release from incarceration for the conviction, whichever is later, unless "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and

Circuit, consistent with other circuits, has directed district courts to consider a variety of factors in conducting the balancing analysis mandated by Rule 609(a)(1): "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." United States v. Browne, 829 F.2d 760, 762-763 (9th Cir. 1987), cert. denied, 485 U.S. 991 (1988); accord, e.g., Pritchard, 973 F.2d at 908-909; United States v. Sloman, 909 F.2d 176, 181 (6th Cir. 1990); Gordon, v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.). A district court's decision to admit a conviction, after an analysis of those factors, is reviewable only for an abuse of discretion. Browne, 829 F.2d at 762.

The district court did not abuse its discretion in this case in holding that petitioner's prior conviction was admissible if she testified at trial.

First, as for the impeachment value of petitioner's prior conviction, the Ninth Circuit has concluded that "prior convictions for drug offenses are probative of veracity." United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); accord United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir.), cert. denied, 516 U.S. 878 (1995). The district court's conclusion that petitioner's methamphetamine possession conviction had "some impeachment value"

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circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b).

(1/28/98 Tr. 13) thus was adequately supported by circuit precedent.

Second, as for the time of the prior conviction, the Ninth Circuit has recognized that even convictions that are ten years old are "not impermissibly stale." Cordoba, 104 F.3d at 229; see also United States v. Givens, 767 F.2d 564, 579-580 (9th Cir.) (upholding admission of eight-year-old conviction), cert. denied, 474 U.S. 953 (1985). In light of those authorities, the district court was entitled to conclude that petitioner's conviction, which occurred within five years of her trial, was "not so remote so as to create undue prejudice" (1/28/98 Tr. 13).

Third, as for whether the prior conviction is so similar to the crime charged that the jury will improperly conclude that "because [the defendant] did it before, he must have done it again," Browne, 829 F.2d at 763, petitioner's prior conviction involved a different illegal drug, a different quantity of the drug (i.e., a personal use quantity versus a distribution quantity), and a different sort of activity (i.e., simple possession versus smuggling and possession with intent to distribute). The district court took into account those differences, noting, for example, that "the prior conviction is for mere use whereas the charge is a smuggling charge" (1/28/98 Tr. 13).

Finally, as for the remaining Brown factors concerning the importance of the defendant's testimony and the centrality of the defendant's credibility, the Ninth Circuit has repeatedly upheld the admission of prior convictions where the defendant's

credibility was critical to the disputed issues at trial. See, e.g., Givens, 767 F.2d at 580 (the district court did not abuse its discretion in concluding that the defendant's prior convictions were admissible, where the defendant's "proposed testimony in which he would have denied committing the offense, would have placed his credibility directly at issue"); Browne, 829 F.2d at 764 (where the defendant testified that he did not commit the crime and had an alibi, the district court did not abuse its discretion in admitting the defendant's prior conviction). The district court permissibly concluded (1/28/98 Tr. 13-14) that the centrality of petitioner's credibility tipped the balance in favor of the admissibility of her prior conviction. It was expected that petitioner would testify at trial that she had no knowledge of the large quantity of marijuana that was found in her van. Such testimony would place petitioner's credibility directly at issue to the same extent as did the defendants' testimony in Givens and Browne.

In sum, if the Court were to grant the petition and conclude that the Ninth Circuit erred in holding that petitioner had waived her right to challenge the district court's in limine ruling on appeal, the district court's ruling on the merits should nevertheless be affirmed. The Court's resolution of the question presented in the petition, therefore, would not alter the ultimate outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

OHLER, MARIA SUZUKI
Petitioner

vs.

USA

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via Federal Express, on this 1st day of September 1999.

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